IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3503 of 1999
with
CIVIL APPLICATION NO. 8881 OF 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Labour Judge and Industrial Tribunal ?

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DIVISIONAL CONTROLER G S R T C
Versus
V K CHAHER

Appearance:
Ms. Krina C. Thakkar for MR YOGESH S LAKHANI for Corporation.
MR JS BRAHMBHATT for workman.

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 07/05/2002

ORAL JUDGEMENT

Heard learned advocate Ms. Thakkar for Mr.

Lakhani for the Corporation. Learned advocate Mr. Brahmbhatt for the respondent has remained present on behalf of the respondent workman. Therefore, the matter has been taken up for hearing in present of both the learned advocates.

2. The original petitioner corporation has challenged the award made by the tribunal concerned in approval application no. 17 of 1994 in Reference (IT) No. 65 of 1991 dated 9th December, 1998 whereby the approval application moved by the corporation has been rejected by the tribunal. This petition was admitted by this Court and ad.interim relief in terms of para 9(C) of the petition was granted on 14th October, 1999 which has continued. The respondent has filed affidavit in reply dated 14th December, 1999 and 24th January, 2002.

3. Learned advocate Ms.Thakkar appearing for the corporation has submitted that the respondent was working as Art-A Mechanic and his duty was to clean the diesel tank for RTO Passing.She has submitted that the respondent workman was not carrying out the said work properly. Not only that but he made wrong entry in the job chart and, therefore, charge sheet was served upon the respondent workman and after completion of the departmental inquiry, the respondent was ordered to be dismissed from service on 21st March, 1994. At the time of dismissal, one month's salary was paid to the respondent workman but the reference no. 65 of 1991 was pending before the tribunal and, therefore, the corporation has filed an application for approval under section 33-(2)(b) of the Industrial Disputes Act, 1947. According to her, the respondent has not performed duties properly from 29.1.1993 to 2.2.1993. She has submitted that to make incorrect entry in the job chart is also a separate and independent misconduct; that the misconduct alleged against the workman was proved in the departmental inquiry and in such situation, the tribunal has erred in interfering with the findings recorded by the competent authority; that the two statements of the officer in charge and the mechanic were obtained during the course of departmental inquiry but the same were not considered by the tribunal and in doing so, the tribunal has erred; the tribunal has also erred in not considering that there was prima facie case against the workman concerned; the tribunal has also erred in rejecting the application for approval filed by the corporation and, therefore, this court should interfere with the order made by the tribunal.

The submissions made by Ms.Thakkar for the

petitioner corporation have been considered by the Court. Before the tribunal, reply to the approval application filed by the corporation was submitted by the workman at Exh. 8 wherein the workman has challenged the approval application on various grounds. Before the tribunal, the corporation has produced relevant papers of inquiry vide Exh. 3 which was admitted by both the sides and therefore, it was exhibited. No documents were produced by the workman before the tribunal. The corporation has produced all the documents relating to the departmental inquiry including the chargesheet, reply and inquiry papers and the dismissal order and thereafter, on behalf of the petitioner corporation, one Mr. Anantrai M. Pandya was examined before the tribunal and vide Exh.16, the respondent was examined. Thereafter, merits of the matter were considered by the tribunal.

The contention raised by the corporation that the representative of the workman was permitted to cross examine the concerned witness in the departmental inquiry was considered by the tribunal. Thereafter, the contention was raised by the corporation that there was no violation of any procedural rules before the tribunal which too was considered by the tribunal. It also considered the contention that the approval application was filed by the Divisional Controller and the order of dismissal was passed by the Senior Divisional Mechanical Engineer who has not signed the approval application. Reliance was placed by the respondent on the decision of the apex court reported in AIR 1978 SC 100 which was considered by the tribunal. The tribunal also examined the allegations made in the charge sheet as well as the reply submitted by the workman thereto. IN the departmental inquiry, reporter Shri N.B. Acharya was examined. Report was examined by the Inquiry Officer in the form of questions and answers. The reporter was cross examined by the representative for the workman. Thereafter, the tribunal has considered the cross examination of the reporter. Thereafter, one witness Shri Mali was examined on behalf of the workman and his evidence was in the form of questions and answers. The tribunal has considered that the witness Shri Mali was the witness for the respondent and therefore the workman was required to ask the questions to Shri Mali but instead of that, the IO has put the questions to the witness for the workman. The tribunal has also considered that in the departmental inquiry, no Presenting Officer was remaining present and the entire inquiry was conducted by the IO asking the questions to the reporter as well as the workman and the witness for the workman. Upon appreciation of these facts and

circumstances, the tribunal come to the conclusion that such nature of inquiry is contrary to the principles of natural justice and it amounts to acting as prosecutor and Judge both by the Enquiry Officer. Ultimately, the tribunal has come to the conclusion that the findings given by the IO are not legal and proper and they are baseless and perverse. The tribunal has considered that while adjudicating approval application under section 33 (2) (b) of the Act, the tribunal is required to consider the prima facie case, whether the prima facie case has been proved by the corporation or not and whether the findings recorded by the IO are legal and valid or not and was of the view that it can examine the question of victimization, unfair labour practice if adopted by the management. Ultimately, the tribunal was of the view that there was no prima facie case made out by the corporation and was of the view that no proper evidence was led by the corporation and the misconduct alleged has not been proved and therefore the findings are vitiated and, therefore, on the basis of such findings and conclusions, the tribunal ultimately rejected an application for approval filed by the corporation.

Learned advocate Ms.Thakkar has submitted that the corporation is required to prove only prima facie case and while adjudicating an application under section 33-2-B of the Act, the tribunal is not required to enter into the merits of the matter and it is not open for the tribunal to examine the evidence and findings recorded by the IO during the course of inquiry and since the tribunal has entered into the merits of the matter and has also examined the evidence and appreciated the findings recorded by the IO, it has erred and, therefore, this court should interfere with the order made by the tribunal. This aspect has been examined by the apex court in case of Lala Ram versus Management of DCM Chemical Works Ltd. and another reported in AIR 1978 SC 1004 wherein the apex court has considered the powers of the concerned authority while adjudicating application for approval. In para 12 of the said decision, the apex court has observed as under:

" 12. The position that emerges from the above quoted decisions of this court may be stated thus; In proceedings under S. 33(2)(b) of the Act, the jurisdiction of the Industrial Tribunal is confined to the enquiry as to (i) whether a proper domestic enquiry in accordance with the relevant rules/Standing Orders and principles of natural justice has been held; (ii) whether a prima facie case for dismissal based on

legal evidence adduced before the domestic tribunal is made out; (iii) whether the employer had come to a bona fide conclusion that the employee was guilty and the dismissal did not amount to unfair labour practice and was not intended to victimize the employee regard being had to the position settled by the decisions of this court in Bengal Bhatdee Coal Co. v. Ram Probesh Singh (1964) I SCR 709 : [AIR 1964 SC 486]; Titagur Paper Mills Co. Ltd. v. Ram Naresh Kumar (1961) 1 Lab. LJ 511) (SC) Hind Construction & ENgineering Co. Ltd. v. Their Workmen, (1965) 2 SCR 83; AIR 1965 SC 917; Workmen of Messrs. Firestone Tyre and Rubber Company of India (P) Ltd. v. Management (1973) 3 SCR 587 : AIR 1973 SC 1227 and Eastern Electric and Trading CO. v. Baldev Lal, 1975 Lab. IC 1435 :(AIR 1975 SC 1892) that though generally speaking the award of punishment for misconduct under the Standing Orders is a matter for the management to decide and the tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe yet an inference of mala fides may in certain cases be drawn from the imposition of unduly harsh, severe, unconscionable or shockingly disproportionate punishment; (iv) whether the employer has paid or offered to pay wages for one month to the employee and (v) whether the employer has simultaneously or within such reasonably short time as to form part of the same transaction applied to the authority before which the main industrial dispute is pending for approval of the action taken by him. If these conditions are are satisfied, the Industrial Tribunal would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If however the domestic enquiry suffers from any defect or infirmity, the labour authority will have to find out its own assessment of the evidence adduced before it whether there was justification for dismissal and if it so finds it will grant approval of the order of dismissal which would also relate back to the date when the order was passed provided the employer had paid or offered to pay wages for one month to the employee and the employer had within the time indicated above applied to the authority before which the main industrial dispute to pending for approval of the action

taken by him."

Another contention raised by Ms.Thakkar that the tribunal has no power and authority to consider the legality, validity of the findings recorded by the IO has also been examined by the apex court in case of Central Bank of India versus Prakash Chand Jain reported in 1969 II LLJ 377 wherein the apex court has held that while adjudicating an application for approval, the tribunal can enter into the merits of the matter and can consider the legality and validity of the findings recorded by the IO. Relevant observations made by the apex court in the said decision are reproduced as under:

"The appeal was preferred against the order of the industrial tribunal rejecting approval sought for by the appellant bank under S. 33(2)(b) of the Industrial Disputes Act. The acts of misconduct levelled against the workman were alleged to have fallen under Para 521-4 (J) of the Sastri award. The tribunal when dealing with the application for approval, held that the enquiry held by the enquiry officer was fair, and was not visited by any irregularity or unfairness but refused to accord approval on the ground that the findings rendered by the enquiry officer were perverse and were not based on evidence inasmuch as most of the findings were the result of mere conjectures of the enquiry officer.

Rejecting the contention of the counsel for the appellant bank that the tribunal, in refusing to accord approval and in disregarding the findings recorded by the enquiry officer, exceeded its jurisdiction conferred by S. 33(2)(b) of the Act and the tribunal having once held that the enquiry was fair, it had no jurisdiction to go into the correctness of the findings of the enqui9ry officer as an appellate court, held that the tribunal can disregard the findings given by the enquiry officer in an application under sec. 33(2)(b) of the Industrial Disputes Act only if the findings are perverse. The test of perversity is that the findings may not be supported by legal evidence. Yet anotehr case of perversity is that when the findings are such which no reasonable person could have arrived at on the basis of the materials before him. Though in regard to certain elements of the acts of misconduct, the trobima; erred om assessomg the perversity of the evidence adduced beforde the

enquiry officer at the domestic enquiry, and though such an enquiry officer was not bound to observe the technical rules of evidence, held in the instant case that substantive rules of evidence which would form part of principles of natural justice have been ignored by the enquiry officer, when he based his findings on hearsay evidence.

It is true that in various cases, it has been held that domestic tribunals like an enquiry officer are not bound by the technicalrule about the evidence in the Indian Evidence Act but it has nowhere been laid down that even substantive rules which would form part of principles of natural justice also could be ignored by the domestic tribunals. The principle that a fact sought to be proved must be supported by statements made in the presence of the person against whom enquiry is held and that the statements made behind the person charged are not to be treated as substantive evidence is one of the basic principles of natural justice which cannot be ignored on the mere ground that domestic tribunals are not bound by the technical rules of procedure contained in the Evidence Act. A domestic tribunal would not be justified in recording its finding on the basis of hearsay evidence without having any direct or substantive evidence in support of such findings. In other words, the findings recorded by the enquiry officer must be supported by legal evidence. The evidence should consist of statements made in the presence of the workman charged and exception is envisaged where the previous statements could be used after giving copies of the statements well in advance to the workman charged but with further qualifications that previous charge must be affirmed as truthful in a general way when the witness is actually examined in the presence of the workman charged.

Applying the above principles and on merits, held that the findings of the enquiry officer were not based on any legal evidence in regard to the two charges levelled against the workman even though partly the first of the charge could be held to be proved."

The tribunal has examined the merits of the

matter and has considered the fact that in entire departmental inquiry, the IO has asked the questions to the reporter as well as to the workman and the witness for the workman in the form of question and answer and has also considered that no representative for the Corporation was remaining present in the departmental inquiry and therefore, considering the nature of inquiry, the tribunal has concluded that the entire procedure which has been followed in the departmental inquiry is contrary to the principles of natural justice and the IO has acted in the capacity of Prosecutor and Judge both. This aspect has been examined by this court in case of Amumiyan Pirmiyan Kadri versus GSRTC & Ors reported in 1994 (1) G.L.R. page 326. In para 14, 15 and 16 of the said decision, it has been observed by this Court as under:

"14. It transpires from the record of the enquiry proceedings that the delinquent did not volunteer to give any oral testimony in the enquiry proceedings. It may be mentioned at this stage that he had no one as his defence assistant in the enquiry proceedings. If at all the delinquent wanted to give any oral testimony, his chief examination could have been recorded by himself. The so called statement of the delinquent at Exh.22 shows that no chief examination of his is taken. What is mentioned there in is that the delinquent was questioned by the Enquiry Officer. It would mean that the delinquent was required to give answers to the questions put to him by the Enquiry Officer.This makes one thing clear that the so called statement at Exh. 22 can by no stretch of imagination be said to be his oral testimony in the enquiry proceedings.

15. The question then arises whether or not the Enquiry Officer could have recorded his explanatory statement in the manner it is recorded by the criminal court under sec. 313 of the Criminal Procedure, 1973 on completion of the recording of the prosecution evidence. As aforesaid, the only provision made in that regard is in Clause (k) of Para 5 of the Appeal Procedure. Thereunder, the Enquiry Officer is invested with the limited power of giving a further opportunity to the delinquent of making a written or oral statement if desired by him. It would mean that, after completion of recording the evidence, the Enquiry Officer has to

ascertain from the delinquent whether or not he has to say anything more with respect to the material on record. If the delinquent so desires, the option is given to him to make an oral or written statement in that regard. It thus becomes clear that such statement to be given by the delinquent after completion of the recording of the evidence should be out of his volition. It is not open to the Enquiry Officer to compel him to give any such statement. If the Enquiry Officer does so, even if being the nature of seeking explanation of the delinquent with respect to the material on record pointing the finger of guilt against the delinquent the Enquiry Officer can be said to be transgressing his limits laid down in Clause (k) of para 5 of the Appeal Procedure.

16. In the instant case, what transpires from the purported statement of Exh.22 recorded by the Enquiry Officer in the enquiry proceedings is that the Enquiry Officer has cross examined the delinquent with respect to certain material on record. This it was certainly not open to him. Shri Desai for the respondents has failed to point out any provisions in Appeal Procedure enabling the Enquiry Officer to undertake such task. If the Enquiry Officer cross examines the delinquent under the guise of recording his statement (which it would not be open to him to do under the Appeal Procedure), he does the robe of the prosecutor while keeping the role of the Judge on his shoulder. It is a settled principle of law that no person can be both a prosecutor and a Judge. If a person tries to be both, he can be said to be biased in conducting the enquiry proceedings. It is a well known principle of law that a biased person is disqualified from conducting such enquiry proceedings. That is a settled principle of natural justice."

Therefore, in view of the observations made by the apex court and also considering the decision of this court, I have perused the entire order passed by the tribunal. According to my opinion, the tribunal was right in appreciating the merits of the matter while coming to the conclusion that the findings recorded by the IO are baseless and perverse. The tribunal was also right in examining the nature of enquiry conducted against the respondent by the IO. In the departmental

inquiry, though there was no voluntary statement made by the respondent before the IO but in fact the respondent was examined by the IO and, therefore, the tribunal was right in coming to the conclusion that the inquiry conducted against the respondent is contrary to the principles of natural justice. The tribunal has rightly come to the conclusion that no prima facie case has been made out by the corporation on the basis of the material on record against the respondent. The tribunal is having jurisdiction to examine these aspects as per the decision of the apex court reported in AIR 1978 SC 1004 and 1969 II LLJ 377 and, therefore, according to my opinion, the tribunal has not committed any error in coming to such conclusions and also in passing such an order of rejecting approval application. Therefore, the order made by the tribunal does not require any interference of this court.

Ms. Thakkar has not been able to point out any infirmity in the order made by the Tribunal. She has also not been able to point out any jurisdictional error and/or procedure irregularity committed by the tribunal. Therefore, there is no substance in the present petition and is required to be dismissed.

For the aforesaid reasons, this petition is dismissed. Rule is discharged. There shall be no order as to costs. Ad.interim relief granted earlier shall stand vacated. As per the averments made in the affidavit in reply as well as in the aforesaid civil application, the respondent is out of jot since 21st March, 1994 and the approval application has been rejected by the tribunal on 9th December, 1998 but in view of the stay granted by this Court, order passed by the tribunal has not been implemented by the corporation till this date though the respondent is out of job. No benefits have been given to the respondent under section 17B of the I.D.Act during the pendency of the petition. In view of these facts, some suitable directions are required to be issued to the petitioner corporation. Accordingly, in view of the decision of the larger bench of the apex court reported in 2002 AIR SCW 249, it is directed to the petitioner corporation to reinstate the respondent workman with continuity of service as per the order passed by the tribunal in approval application within two months from the date of receipt of copy of this order and to pay full wages with all consequential benedits to the respondent workman from 21st March, 1994 till the date of his actual reinstatement in service by the corporation, within three months from the date of receipt of copy of this order.

In view of the aforesaid order passed by this court on the main matter today, civil application No. 8881 of 2000 filed by the workman for benefits under section 17-B of the Industrial Disputes Act, 1947 shall not survive and the same is, therefore, disposed of accordingly as not surviving with no order as to costs.

7.5.2002. (H.K. Rathod,J.)
Vyas